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No. 94-1013

In The

Supreme Court of the United States

October Term, 1994

OJAVAN INVESTORS, INC., ET AL.,

Petitioners,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Petition For Writ Of Certiorari
To The California Court Of Appeal
Second Appellate District, Division Two

BRIEF AMICUS CURIAE OF THE FIFTH AMENDMENT FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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This brief amicus curiae of The Fifth Amendment Foundation in support of the Petition for Writ of Certiorari sought by Petitioners in this case is respectfully submitted pursuant to Supreme Court Rule 37. Consent to the filing of this brief has been granted by counsel for all parties.

INTEREST OF AMICUS CURIAE

The Fifth Amendment Foundation, a California nonprofit corporation, is dedicated to the protection of the rights of property owners and to the equitable implementation of development regulations consistent with the protections of the Fifth and Fourteenth Amendments to the United States Constitution. As stated in the Foundation's Bylaws, the purposes of the Foundation are "to educate the public on the role of the Fifth and Fourteenth Amendments to the Federal Constitution in protecting private property rights" and "to defend the rights of private property owners to a balanced and equitable implementation of existing or proposed development regulations consistent with the protections of the Fifth and Fourteenth Amendments."

As amicus curiae, The Fifth Amendment Foundation seeks to augment the argument in the Petition for Writ of Certiorari. The Fifth Amendment Foundation believes that its public policy perspective and collective experience in support of private property rights and their relationship to a healthy economic environment will provide an additional viewpoint with respect to the constitutional issues presented. This case addresses the most basic of rights related to property ownership – the right to access to the courts to review government restrictions on property. As a result, The Fifth Amendment Foundation believes it is in the best interest of all affected parties to have clear direction from this Honorable Court as to the appropriateness and legality of the California Courts' refusal to review certain local government actions.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The California Court of Appeal's recent decision in *Ojavan Investors, Inc. v. California Coastal Commission* represents a shocking denial of due process rights and misapplication of procedural requirements resulting in a rule of law which precludes judicial review of Coastal Commission actions and which is in direct conflict with previous decisions of this Honorable Court. For the reasons discussed below, we respectfully request that you grant the pending Petition for Writ of Certiorari in this matter.

The Court Of Appeal Has Eliminated The Opportunity For Judicial Review Of Certain Coastal Commission Actions.

The facts in *Ojavan* are undisputed. On August 20, 1992 the California Coastal Commission adopted findings and issued an enforcement order regarding the subject property. On October 13, 1992 Petitioner filed its petition for writ of mandate. Therefore, this action was brought within the short 60-day statute of limitations contained in the California Coastal Act. *See* California Public Resources Code § 30801. Yet despite its timely filing, the Court of Appeal has dismissed the entire action, on demurrer and without leave to amend, as a result of an alleged statute of limitations violation. The California Court of Appeal has held that because Petitioner failed to bring an action within 60 days of the issuance of the original Coastal Permits regarding the subject property, some dating back to 1979, Petitioner is barred forever from challenging any subsequent action by the Coastal Commission regarding the same property. According to the Court of Appeal, the August 1992 action of the Coastal Commission cannot be judicially challenged. That ruling conflicts directly with the clear statements of the Coastal Act itself, a plethora of California and federal

case law, and the Coastal Commission's own internal interpretations of the Coastal Act.

California Public Resources Code § 30801 states that "any aggrieved person shall have a right to judicial review of ***any decision or action*** of the Commission by filing a petition for writ of mandate in accordance with Section 1094.5 of the California Code of Civil Procedure, within 60 days after the decision or action has become final." (Emphasis added.) Here, Petitioner filed an action within 60 days after the Coastal Commission's August 1992 action. The Court of Appeal has found that somehow the Commission's August 1992 action is not a "decision or action" pursuant to Section 30801. Without explanation the Court of Appeal has decided to relate the 60 day statute of limitations back to the original permit action regarding the subject property and not to allow any challenge, even those brought within the 60 day statute of limitations, to any subsequent action of the Commission regarding the same property.

Clearly, Petitioner must be allowed the opportunity to challenge the Commission's August 1992 action. Even the Commission's own August 20, 1992 written order states that "any person or entity against whom this order is issued may file, pursuant to Section 30803(b) of the California Public Resources Code, a petition with the Superior Court for a stay of this order." Judicial review of the August 1992 action is clearly allowed and, even if Petitioner's pleadings stated an incorrect cause of action, amendment should be allowed to the timely-filed complaint so as not to bar Petitioner from any opportunity for judicial review.

Under the Court of Appeal's rationale, once 60 days had passed from the 1979 action, the California courts can never again be involved in the interpretation, review or enforcement of any Coastal Commission action regarding the subject property. Here, the Coastal Commission is taking action to enforce a 15-year old permit. In the course of enforcing that permit the Commission has taken

subsequent actions and made numerous interpretations of the terms and conditions of that permit. Not only does Petitioner have the right to have judicial review of the subsequent actions by the Commission regarding the subject property, but should issues arise requiring declaratory relief or judicial interpretation of the terms and conditions of the permit itself, or of documents generated as a result of the permit (i.e., the Declarations of Restrictions), Petitioner is entitled to such judicial review. According to the Court of Appeal, however, once 60 days have passed from an initial Coastal Commission action the Commission may do whatever it pleases for the rest of time regarding the subject property. Such a holding cannot stand.

The same analysis can be applied to the Court of Appeal's conclusion with regard to the Coastal Commission's waiver defense. Even if Petitioner's predecessors in interest agreed to the permit conditions, and as a result waived their rights to challenge those conditions, such a waiver cannot possibly apply to subsequent Commission actions or to the ability of a party to seek declaratory relief as to the interpretation and enforcement of the terms of the permit and later generated documents.

CONCLUSION

As this Honorable Court is well aware, the California Coastal Commission on numerous occasions has stepped across the bounds of statutory, common law and constitutional propriety. Now the Commission has somehow convinced the Court of Appeal to deny a property owner the right to challenge Commission actions, even within the 60-day statute of limitations, when such an action involves the subject property of an earlier unchallenged Commission action. The California Coastal Act itself is absolutely clear that "any decision or action" of the Coastal Commission may be challenged within 60 days. As a result, a subsequent enforcement action, and in particular one in which a hearing was held, findings were

made, and a Commission vote was taken, clearly falls within the "decision or action" language of California Public Resources Code Section 30801. The Court of Appeal's ruling in this case has denied Petitioner any opportunity for judicial review. On that basis alone a Writ of Certiorari should be granted and the Court of Appeal decision reversed.

To allow the Court of Appeal's published decision to stand would serve only to vastly expand the Coastal Commission's powers to take action outside the scope of any judicial review or remedy. Such a result is without basis in California or federal law. Property owners must have the right to challenge Coastal Commission actions whether they be initial actions on a permit application or subsequent actions to interpret or enforce the terms and conditions of previous approvals. The Coastal Commission has not proven itself worthy of protection from all judicial review nor does the law allow such an illogical result. The Fifth Amendment Foundation respectfully requests that this Court grant a Writ of Certiorari in this case.

DATED: January 13, 1995

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